Circuit Court for Baltimore County
Case Nos.: C-03-CR-19-003431 (Escobar-Hernandez)
C-03-CR-19-003426 (Portillo-Chavez)

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

CONSOLIDATED

No. 541 and No. 543

September Term, 2021

JONATHAN ESCOBAR-HERNANDEZ
v.
STATE OF MARYLAND

HUGO PORTILLO-CHAVEZ
v.
STATE OF MARYLAND

Zic,
Ripken,
Meredith, Timothy E.
(Senior Judge, Specially Assigned),
JJ.

Opinion by Meredith, J.

Filed: July 13, 2022

Hugo Portillo-Chavez and Jonathan Escobar-Hernandez, appellants, were tried jointly before a jury in the Circuit Court for Baltimore County, and were each found guilty of murder in the first degree, and conspiracy to commit first degree murder.[1] Their defense at trial focused the jury's attention on the fact that the State's evidence against them depended upon the testimony of four cooperating participants in the murder who had pled guilty and were testifying pursuant to plea agreements. The appellants argued that the testimony of those cooperating witnesses was not reliable, and without that unreliable testimony, the jury could not find that the appellants were involved in the murder.

The events at trial that gave rise to the two issues raised by each of the appellants occurred after the close of evidence. When the jury retired to begin deliberations, a courtroom clerk mistakenly provided the jury—in addition to the evidence admitted at trial—a manila envelope or folder that contained numerous documents that had *not* been admitted in evidence, including two gruesome photographs depicting the murder victim's severe injuries, as well as over 100 pages of clerical documents the clerk had collected (such as the profiles of prospective jurors and records of the sheriff's office transporting the appellants and the convicted witnesses from the detention center to court). The first indication of the clerk's mistake came on the second morning of deliberations when a

[1] During opening statements, counsel for Mr. Portillo-Chavez told the jury that, although the appellants and some of the witnesses in the case had hyphenated last names, the custom is to generally refer to the individual by the first of the hyphenated words. He stated: "In Hispanic culture, it's said that first [of the] last names, that's your father's name, that's the one that you carry. So, he's Mr. Portillo, he's Mr. Escobar. . . . [T]hat's the naming designation in most Hispanic cultures." We shall follow that naming designation in this opinion.

different clerk provided the jury the trial exhibits and one juror asked about the manila envelope they had been given the previous day. Neither counsel nor the appellants were informed about this conversation or about the clerk's mistake until after the jury delivered its verdict.

Each appellant raises the same two questions for our review:

> I. Did the trial court err by failing to promptly disclose the jury communication regarding the Clerk's Folder [that contained documents that had not been admitted in evidence and was mistakenly provided to the jury during its first day of deliberations]?
>
> II. Did the trial court err in denying Appellant's Motion for New Trial based on the erroneous submission of the Clerk's Folder to the deliberating jury?

For the reasons explained herein, we conclude that the court's failure to timely disclose to the attorneys and defendants the jury communication regarding the manila folder, as mandated by Maryland Rule 4-326(d), was an error that requires us to reverse the convictions and remand the cases for a new trial. [2]

[2] Maryland Rule 4-326(d) provides, in pertinent part:

> **(d) Communications With Jury.**
>
> * * *
>
> (2) *Notification of Judge; Duty of Judge.*
>
> (A) A court official or employee who receives any written or oral communication from the jury or a juror shall immediately notify the presiding judge of the communication.
>
> (B) The judge shall determine whether the communication pertains to the action. If the judge determines that the communication does not pertain to the action, the judge may respond as he or she deems appropriate.

(continued…)

Because of that conclusion, we do not reach the question of whether the clerk's error in submitting to the jury the documents that were not in evidence provides a separate basis for granting a new trial.

BACKGROUND

In the early morning hours of July 31, 2019, Daniel Alvarado-Quar ("Mr. Alvarado") was brutally murdered outside of his apartment building in Baltimore County. The autopsy report indicated that he had been stabbed or slashed forty times.

As the police investigation progressed, the investigators learned that Mr. Alvarado had been at a laundromat earlier in the evening, and a number of individuals (including Mr. Portillo and Mr. Escobar) seemed to be hanging around while Mr. Alvarado was there. During the investigation, the police developed information that led them to believe that several of the people hanging around the laundromat were members of a gang referred to as MS-13. Alexi Villacorta-Rivas ("Mr. Villacorta") was one of those people, and he would later testify for the State that he was a member of a separate clique of MS-13, and he participated in the murder of Mr. Alvarado. He testified that the group believed

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> **Committee note**: Whether a communication pertains to the action is defined by case law. *See*, for example, *Harris v. State*, 428 Md. 700 (2012) and *Grade v. State*, 431 Md. 85 (2013).
>
> (C) If the judge determines that the communication pertains to the action, the judge shall promptly, and before responding to the communication, direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response. The judge may respond to the communication in writing or orally in open court on the record.

(apparently mistakenly) that Mr. Alvarado was a member of the rival 18th Street gang. Mr. Villacorta further testified that he personally participated in the attack upon Mr. Alvarado, along with Mr. Escobar and Mr. Edwin Garcia-Martir ("Mr. Garcia"), and that Mr. Portillo was present during the attack after having ordered the killing. Mr. Villacorta testified that "[t]he three of us [*i.e.*, Villacorta, Escobar, and Garcia] killed the person [Mr. Alvarado]."

The State eventually charged ten individuals with Mr. Alvarado's murder (either as principals or accomplices). Four of those individuals pled guilty before the trial of Mr. Portillo and Mr. Escobar, and were called to testify during the State's case against the appellants. Mr. Villacorta testified that he was a member of MS-13, but was part of a clique based in Huntington, New York. His rank in the gang was that of a "chacao," and he would "have to kill somebody to get a higher rank[.]" He had never met the head of that clique, whom he understood to be in jail. Mr. Villacorta testified that he knew Mr. Portillo to be a "home boy" in a different clique of MS-13, and he understood Mr. Escobar was a "member" or "chicao" [sic] in the same clique of MS-13 as Mr. Portillo.

Another of the cooperating witnesses who had pled guilty, Leonel Velasquez-Hernandez ("Mr. Velasquez"), testified that he was also a member of MS-13, in the same clique as Mr. Villacorta. He said that, on the night of July 30, he met up with a group that included Messrs. Villacorta, Portillo, and Escobar, and Mr. Portillo told him that they were looking for a member of an enemy gang whom they were going to kill. Mr. Velasquez said that, when he arrived at Mr. Alvarado's apartment building later that night, Mr. Alvarado had already been killed. On August 12, 2019, Mr. Velasquez left the state of Maryland

with a group that included Messrs. Portillo and Escobar. They were arrested in Mississippi. Mr. Velasquez pled guilty to conspiracy to commit first degree assault, and agreed to testify against the other codefendants.

Odaliz Rosas-Yanez ("Ms. Rosas") was another cooperating witness who testified pursuant to her agreement to plead guilty to being an accessory after the fact to first degree murder. She had assisted the group in locating Mr. Alvarado on the night of the murder, had provided some transportation of various individuals in her car, and two weeks later, drove her car to Mississippi, transporting Messrs. Portillo, Escobar, and Garcia, as well as three other men.

Hugo Leonel Martinez-Vasquez ("Mr. Martinez") also testified pursuant to an agreement to plead guilty to being an accessory after the fact to first degree murder. On the night of Mr. Alvarado's murder, Mr. Villacorta had asked Mr. Martinez to provide transportation for the some of the group. Mr. Martinez worked as a barber with Mr. Alvarado's brother, but was unaware, as of the time of the murder, of any plan to harm Mr. Alvarado. Mr. Martinez testified that he had followed Mr. Villacorta's instructions to drive four men to Mr. Alvarado's apartment complex. He identified the group he transported as including Messrs. Villacorta, Portillo and Escobar. After arriving at the apartment complex, the other men exited his car. He waited for them, and, when they returned to his car, some of them had blood on them. He then drove them to the apartment building where Mr. Villacorta lived, but he did not learn of Mr. Alvarado's death until the following day.

The State called Baltimore County Police Officer Thomas Huesman, who testified that he was one of the first officers to arrive at the scene of the murder. He was asked to identify a series of photographs, marked as State's Exhibits 5-B through 5-I, that depicted the scene at the time he arrived. Among the color photographs was one marked Exhibit 5-F for identification; it showed that the victim's neck had been cut open so severely—just below his jawbone—that his internal anatomy was visible. The defendants objected to the crime scene photos, and, at the bench, the trial judge sustained the objection as to Exhibit 5-F only, explaining:

> I'm going to sustain the objection as to Exhibit 5-F. The graphic nature of that photograph I think is, meets the test of, you know, an exhibit that might unnecessarily inflame the jury. The balance I'll deny and allow the State to introduce, I guess it's B through I, with the exception of F, okay? . . . So, 5-F will be i.d. only, 5-B, C, D, [Madame Clerk,] you getting this? 5-F is i.d. only, the balance of series [5-] [E]xhibits is going to be admitted.

At the same bench conference, the court also considered the defendants' objections to the autopsy photographs that had been marked as State's Exhibits 6-B through 6-J for identification. Exhibit 6-B showed the same severe wound that was depicted in Exhibit 5-F, and the court ruled that Exhibit 6-B, too, would be excluded, stating:

> Looking at the autopsy photographs, I'm going to sustain the objection as to the first one [*i.e.*, Exhibit 6-B] of this series that depicts the Defendant's [sic, victim's] interior of his throat. Again, I think it's unnecessarily, it's horrific. The balance of the photographs that are . . . appended to the medical examiner's report, I will admit.

During closing arguments, counsel for the appellants focused on the unreliability of the witnesses who had testified pursuant to plea agreements. Counsel for Mr. Escobar argued that Mr. Villacorta was the lynchpin of the State's case, but he had pled guilty to

killing the victim and was hoping to receive a reduced sentence for his testimony. Counsel reminded the jury that the judge had instructed them to consider the testimony of a co-defendant with caution.[3]

Counsel further argued: "There is no evidence that [Mr. Escobar] was a member of MS-13." "What you do have is . . . these Co-Defendants that pled guilty. You have no physical evidence, you have no forensic evidence, you have no video evidence, and you have no cell phone evidence regarding [Mr. Escobar]." "And not once did you hear any information, not one word, about any cell phone evidence from my client. Nor did you see him on any of those videos." Counsel emphasized: "[T]here are no fingerprints, there's no DNA, there's no physical evidence, there's no forensic evidence, there's nothing that wraps this case up other than these cooperating Co-Defendants."

Counsel for Mr. Portillo adopted a similar theme in his closing argument, stating: "If you are going to believe everything that Villacorta said, then you're pinning your hat on the self-admitted word of a murderer. That's a tough sell on you." "[H]e called himself a killer." "Are you going to put a murder's badge on this gentleman because [Villacorta] said what he said and because he's going to get less time?" "In this case, there's no DNA

[3] The court had instructed the jury:

> [Y]ou may consider the testimony of a witness who testified for the State as a result of a plea agreement or a promise that he will not be prosecuted or another benefit or expectation of a benefit.
>
> However, you should consider such testimony with caution because the testimony may have been influenced by a desire to gain leniency, freedom or another benefit by testifying against the Defendant.

pinning this to Mr. Portillo. There is no fingerprint evidence pointing to Mr. Portillo. There is no blood evidence pointing to Mr. Portillo." "[T]his young man has no criminal convictions."

After closing arguments, the jury began deliberating late in the afternoon. Although, as noted above, the court had sustained objections to the admission of the two photographs marked as State's Exhibits 5-F and 6-B, it would later come to light that, during the first day of jury deliberations, the courtroom clerk mistakenly provided the jury a manila envelope or folder containing those two excluded photographs and numerous clerical documents that were not part of the evidence. After the jury had deliberated for a little more than an hour on the first day, the jury was excused for the evening.

When the jury returned the following morning to resume their deliberations, after they were provided the trial exhibits that had been admitted in evidence, but not the manila folder, one of the jurors asked a court clerk about the manila envelope that had been provided to them with the exhibits the previous afternoon. The attorneys and defendants were not informed of this oral communication with a juror at that point, but the juror was told to "recommence with deliberations."

Approximately two hours later, the jury sent a note seeking clarification about the count charging participation in criminal gang activity. The court brought counsel and the defendants into the courtroom and, on the record, reviewed the note. The court asked counsel for their suggestions regarding a response to the note, and after hearing from all counsel, the court brought the jury into the courtroom and re-read a portion of the pertinent

statute. The court then instructed the jury "to retire once again to the jury deliberation room to re-commence with jury deliberations." The court recessed again. There was no mention at that point of the communication about the manila folder.

Fifteen minutes later, the jury sent word that it had reached a verdict. With respect to each defendant, the jury announced identical verdicts: guilty of murder in the first degree, guilty of conspiracy to commit first degree murder, and not guilty of participation in a criminal gang resulting in death. The jury was polled, and then hearkened to the verdict.

After receiving the jury's verdict, the judge directed the jury to "retire back to the jury deliberation room[,]" and thanked the jurors for their service. The parties then talked about proceeding with sentencing later that afternoon. At that point, the court informed the parties about the documents that improperly went to the jury room the first day of deliberations, stating:

> There's one other thing that I'd like to raise. When we sent the jury out this morning, as Madam Clerk was handing them the exhibits in the case, one or more of the jurors asked for a manila envelope and the idea was that this juror believed that a manila envelope was provided to them yesterday.
>
> And it may well have been.
>
> * * *
>
> I had a substitute Court Clerk in here yesterday afternoon and she was the one who furnished the jury with the exhibits in the case . . . . [I]t's possible, as I've reconstructed things, that in addition to the exhibits in the case, which were allowed in evidence, she also may have handed the jury [my courtroom clerk's] folder with things in it that she was to scan into MDEC, right?

> CLERK: It had the jury profiles and all my work sheets (inaudible).
>
> THE COURT: Also in that folder, which you can examine, . . . are the two photographs that I refused to admit in evidence.
>
> * * *
>
> If it is what happened, I don't know if the jury opened that manila envelope or not. [4]

After discussing concerns about the rule against asking a juror to impeach a jury's verdict—*see, e.g.*, *Stokes v. State*, 379 Md. 618, 637 (2004) ("a juror may not impeach his or her verdict"); *Wernsing v. Gen. Motors Corp.*, 298 Md. 406, 411 (1984) ("a juror cannot be heard to impeach his verdict"); Maryland Rule 5-606(b) (limiting a juror's testimony about the validity of a verdict)—the parties and judge reached a consensus to conduct limited voir dire of some jurors before they were released from the case.[5]

[4] In addition to the two excluded photographs, the documents in the manila folder included the courtroom clerk's form "Hearing Sheet[s]," a statement of all charges that included some that were not submitted on the verdict sheet, records of transport of prisoners to court (titled "Report of Prisoner Brought to Court") for the defendants and four cooperating witnesses, a "Circuit Court Resource Docket for Baltimore County," voir dire questions, sheets containing the scripts for the oaths to be administered to interpreters and witnesses, the seating chart for the jury (identifying the jurors by numbers only), and the three sets (each 42 pages) of "Juror Profile[s]" that had been utilized by the attorneys during jury selection and then collected from the attorneys.

[5] Citing *Eades v. State*, 75 Md. App. 411, 419 (1988), the State asserts in its brief in this case: "Courts are permitted limited inquiry into the jury's deliberations, before the jury is discharged." This Court stated in *Cooch v. S & D River Island, LLC*, 216 Md. App. 275, 292 (2014), an opinion authored by Judge Charles E. Moylan, Jr., that, notwithstanding Lord Mansfield's Rule generally prohibiting consideration of a juror's testimony to impeach a verdict: "When a jury infraction is discovered before a verdict has been rendered (or at any time before the jurors have ultimately dispersed), there is no bar to a juror's giving evidence about the infraction. The sanctity of an enrolled verdict is in no way (continued…)

The foreperson did not recall seeing the manila envelope or its contents the first day, but did recall hearing Juror 7 say on the second morning of deliberations that they were missing a manila envelope that had been in the jury room during the first day of deliberations. Juror 7 was then questioned, and the colloquy included the following:

> THE COURT: . . . I'm holding a manila folder in my hands here. Did you notice that this was in the jury room yesterday?
>
> JUROR: Yes.
>
> THE COURT: Okay. Was it opened during jury deliberations?
>
> JUROR: Yes. . . . I opened it.
>
> THE COURT: Okay. Did you look through it?
>
> JUROR: Kind of, but not really.
>
> THE COURT: Do you recall anything that you may have seen in the, in this manila env, folder?
>
> JUROR: Just pictures.
>
> * * *
>
> [DEFENSE COUNSEL]: Ma'am, did, did the other jurors see the pictures as well?
>
> JUROR: Um hm.[6]

involved. There is no repose to be protected." (Citing cases involving "pre-verdict infractions," *id*. at 293.)

[6] The record does not further clarify whether this "Um hm" was an affirmative or negative response, and does not clearly indicate the number of jurors who looked at either the photographs or any other documents that were in the manila folder.

Initially, Juror 7 described the photos that had been in the manila envelope by saying simply that "it looked like more autopsy photos." And she seemed to say that the photos from the envelope that she had seen on the first day were *still* back in the jury room. At the suggestion of counsel for one of the defendants, and with the State's agreement, the Court took the photos marked as Exhibits 5-F and 6-B for identification out of the envelope and asked the juror if those "were the pictures that you looked at yesterday afternoon[.]" The juror confirmed that they were.

After the juror returned to the jury room, the judge made the following comment regarding those two photos:

> I declined to allow them to be placed in evidence because I didn't think it was necessary for the jury to consider these photographs in its deliberations.

Defense counsel moved for a new trial based on the court personnel's error in providing the jury the manila envelope containing photos and court documents that were not admitted in evidence. The State opposed the motion. The court's initial response was:

> [P]reliminarily I will say that I did not admit Exhibits 5-F or 6-B simply because I thought they were unnecessary. They were duplicative, they are very, very graphic and I didn't think it was necessary for the jury to see these particular photographs, amongst the array of other, not equally disturbing, but also disturbing photographs that were admitted in evidence in order to decide this case fairly.
>
> So, that's my preliminary thought on this. I didn't think that they were inadmissibly [sic], I just thought it was not provident to admit them in light of the other evidence and that it was not [sic], evidence that was unnecessary under the circumstances presented.

The court directed counsel to return two days later to further argue the defendants' motions for new trial.

The parties submitted memoranda and appeared two days later to argue the motions. Defense counsel focused on the non-evidence documents that had contaminated the jury deliberations, and drew the court's attention to not only the excluded photographs, but also the juror profile documents and inclusion of the original charges that listed counts subsequently dismissed. The State conceded that the clerk had committed an error in providing the jury documents that were not in evidence, but urged the court to find that the error was harmless beyond a reasonable doubt.

After the trial court had heard from counsel for all parties, the court denied the motions. In the course of explaining the basis for that ruling, the court provided this description of the communications with the juror that occurred when deliberations resumed on the second day:[7]

> **[O]ne of the jurors, as we were closing the doors, stuck her head out of the door and said what about that manila folder? She said that to my Law Clerk**. I did not know what she was talking about but as we set [sic], we, **we just simply told her to return to the jury room and recommence with deliberations.**
>
> Thereafter, I was curious about this folder business and so I looked into it and discovered, I think, what we've been able to establish as a matter of record after the jury returned the verdicts, which was that this folder with these documents in it was erroneously and by mistake of the Clerks, placed

[7] As the appellants point out, this statement was the first time the court expressly included the fact that the jury had been told to "recommence with deliberations." Appellant Escobar states in his brief: "[T]he trial court did not inform the parties of its *response* to the jury's communication until it was ruling on Appellant's motion for new trial, two days after the verdict."

> in the jury deliberation room along with the evidence for the first day of deliberations.

(Emphasis added.)

The court further explained its basis for denying the motions for new trial:

> I went back and listened to the tape . . . of what I said when I declined to admit Exhibits 5-F and 6-B, and I think that's what really the case is about.
>
> I'll determine preliminarily that the papers that are in this file, in, in this, I shouldn't call it a file, it's a manila folder, by and large, are simply clerical documents that could not conceivably or colorably have affected any jury determinations made.
>
> I've looked at every single document, there's no arguable or colorable suggestion that, that a juror could have looked at any of these clerical documents and had that any way, shape or form impact his or her deliberations in the case. That the, there's just, there's just nothing in any of these documents that would have been relevant to, to decisions made by the jury under the circumstances.
>
> So, we're really here . . . about Exhibits 5-F and 6-B, which are the photographs of the neck wound to the victim in this case.

After describing each of the crime scene photos and autopsy photos that *were* admitted in evidence, the judge continued:

> Certainly, all the photographs of injuries to the victim were relevant and they were otherwise authenticated. They were genuine and authentic. There was no debate or dispute about that, nor is there at this point at all.
>
> [Counsel for Mr. Portillo] referred to the, the, the two photographs that are the subject of this inquiry as inadmissible. I disagree. They were certainly admissible. They were relevant. They depicted in a fair and accurate way injuries, fatal injuries, to the victim in this case, which was a murder case. And so, by any definition they were relevant.
>
> I elected to decline to enter those into evidence because I thought they were unnecessary. I thought there was plenty of pictorial evidence of the injuries to this victim that preceded his, that caused his death and the, the two

photographs that were not admitted were simply cumulative. I did use the word unnecessary twice when I ruled on all that before ordering that they be marked for identification only.

So, one of the ways of looking at this is as I pondered it over the last couple of days was whether had I decided to admit those photographs, along with all the others, there would have been grounds for reversible error by an appeals court later.

And there certainly would not be. And precisely because they're relevant and they're material and they're genuine and they're authentic.

So, in order to attribute the significance that the Defense asks me to to those particular photographs, you know, there, there would really have to be a determination by me that they were, they were inadmissible to occupants [sic] under the rules of evidence for reasons other than being cumulative and that's just, as far as I'm concerned, these photographs simply depict the injuries to this victim in a way that is more graphic then [sic] was necessary to present to the jury and that's why they were not admitted.

So, the issue is, is, there's, there's a couple of things, findings that, that I think I've had to make, I have to make here. And the first is the overarching determination of whether these Defendants had a fair trial, whether they, they were accorded due process in this case and whether they were given a fair and balanced trial and whether, and, and I, I do find that they had a fair trial. There's no, I find that beyond any doubt whatsoever.

They were rigorously defended. We know what the defenses were, the defenses had nothing whatsoever to do with the injuries depicted specifically in the two photographs that were marked for identification.

But I believe and find, as the presiding Judge in this case, that these Defendants had a fair trial. And that it is not in the interest of justice to, to, to award another trial based on this issue or problem.

I find that the erroneous submission by the Clerk of this file, including these two pictures, to the jury, was harmless beyond a reasonable doubt and I find no possibility that the review, that a review of the information that was in the manila folder influenced the verdicts in this case.

They simply were cumulative as to the injuries sustained to this victim's neck and the jury already had that information to begin with.

> So, the Motions for new trial, I think the record is adequately preserved. The Motions for new trial are respectfully denied[.]

PRESERVATION

The State argues that "this Court should not consider whether the trial judge erred by declining to share a jury communication with counsel" (capitalization altered) because "[t]his claim was not raised below and is therefore waived." But the appellants contend that the court's delay in disclosing the communication deprived them of a meaningful opportunity to raise the issue during the trial, and they note an analogy to Maryland Rule 4-323(c), which provides, in pertinent part: "If a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection at that time does not constitute a waiver of the objection." They state that their "primary position is that strict compliance with [the preservation requirement of] Rule 8-131 is obviated by the trial court's failure to fully disclose its *ex parte* communication with the jury until its ruling on [appellants' motions] for new trial, two days after the verdict." They further note that, in *Stewart v. State*, 334 Md. 213, 221 (1994), trial counsel for the defendant did not pursue an argument regarding Rule 4-326 at trial, but did rely on that rule in the direct appeal to this Court. (When *Stewart* was decided, the obligation to disclose communications with jurors that is now covered by Rule 4-326(d) was covered by Rule 4-326(c).)

In *Stewart*, the Court of Appeals recognized that neither Rule 4-326 nor Rule 4-231 (regarding a defendant's right to be present during the trial) had been argued in support of the motion for mistrial in the circuit court, but nonetheless found that it was appropriate to

consider the applicability of those rules pursuant to the court's discretion granted by Maryland Rule 8-131(a), which provides:

> The issues of jurisdiction of the trial court over the subject matter and, unless waived under Rule 2-322, over a person may be raised in and decided by the appellate court whether or not raised in and decided by the trial court. Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.

The Court held in *Stewart*:

> The word "ordinarily" [in Rule 8-131(a)] gives us discretion to consider issues not raised or decided below. We exercise our discretion here to determine the propriety of the denial of the motion for a mistrial on the basis of Rules 4-326(c) and 4-231 even though those Rules were not relied on by—or argued before—the trial court.

334 Md. at 222 (citations omitted). *See Denicolis v. State*, 378 Md. 646, 657-58 (2003) (Court of Appeals reversed for violation of Rule 4-326 even though that rule was not argued in the circuit court because "neither [Denicolis] nor his attorney were informed about the [jury's] note until after the verdict was returned, the jury was discharged, and sentence was imposed.").

In this case, it appears that the State suffered no prejudice from the appellants' failure to argue Rules 4-231 and 4-326(d) during their motions for new trial because there was no practical option available to cure the errors at that late point in the proceedings.

Because we perceive no material difference between the manner in which the error regarding the juror communication occurred in *Stewart* and this case, we shall exercise our

discretion similarly in this instance and consider the appellants' argument based upon Rule 4-326(d) even though that rule was not expressly argued in the circuit court.[8]

STANDARD OF REVIEW

The failure of a trial court to comply with the procedures required by Rule 4-326(d) is evaluated pursuant to the "harmless error" standard of review. *Gupta v. State*, 452 Md. 103, 124 (2017).

In cases analyzing whether a violation of Rule 4-326(d) was harmless, the Court of Appeals has focused upon a defendant's right to receive notice of the juror's communication and opportunity for input into the trial court's response before the court responds to the juror's communication. *See, e.g., Grade v. State*, 431 Md. 85, 105-06 (2013): '"[I]t is error for a trial court to engage in a communication with the jury, or jurors, off the record, and without notification to counsel, and **that error is presumably prejudicial unless the State can affirmatively prove otherwise**.'" (Quoting *State v. Harris*, 428 Md. 700, 721 (2012).) (Emphasis added.) "Petitioners are not required to prove what they would have done differently; the burden is on the State to persuade us

[8] Appellants also argue, in the alternative: "if necessary, this Court should exercise plain error review because the trial court's error satisfies the four prongs of plain error review[.]" *See Beckwitt v. State*, 477 Md. 398, 464 (2022) (describing four conditions that "must be satisfied" for an appellate court to engage in plain error review, but nevertheless addressing the legal issue raised by Beckwitt "[e]ven though the issue is not preserved for appellate review nor a matter that qualifies for plain error review"). Because we conclude, as the Court of Appeals did in *Stewart*, that this is an appropriate case for us to exercise our discretion pursuant to Rule 8-131(a) to consider the trial court's violation of Rule 4-326, we need not consider whether review would also be warranted under any other basis.

beyond a reasonable doubt that violations of Rule 4-326 did not influence the verdict to the Petitioners' prejudice." *Perez v. State*, 420 Md. 57, 76-77 (2011).

VIOLATION OF MARYLAND RULES 4-231 and 4-326(d)

Appellants assert that reversal is required because of the trial court's failure to comply with Maryland Rule 4-326(d)—the rule regarding communications with jurors—and thereby also violating the related Rule 4-231 that provides for a defendant to be physically present during such phases of the trial.[9]

Appellants point out that Rule 4-231 addresses a defendant's right to be present, with few exceptions that are not applicable here, during all phases of the trial. They note that, in *Harris*—a case addressing a trial court's failure to promptly disclose a communication between a juror and the judge's secretary—the Court of Appeals addressed the overlap between Rules 4-231 and 4-326(d) as follows:

> This Court consistently has recognized that "an accused in a criminal prosecution for a felony has the absolute right to be present at every stage of his trial from the time the jury is impaneled until it reaches a verdict or is discharged, and there can be no valid trial or judgment unless he has been afforded that right." *Midgett v. State*, 216 Md. 26, 36, 139 A.2d 209, 214 (1958). This well settled constitutional and common law right, as we have often recognized, is guaranteed by Article 5 of the Maryland Declaration of Rights, *see Bunch v. State*, 281 Md. 680, 683-4, 381 A.2d 1142, 1143 (1978); *Brown v. State*, 272 Md. 450, 457, 325 A.2d 557, 560 (1974), and, in some measure, by the Fourteenth Amendment to the United States Constitution. It is also preserved by Maryland Rule 4-231. **It is, moreover, well settled that any communications between a judge and the jury which pertain to the action constitute just such stages of trial at which the defendant is**

[9] Rule 4-231(b) provides: "A defendant is entitled to be physically present in person at a preliminary hearing and every stage of the trial, except (1) at a conference or argument on a question of law; (2) when a nolle prosequi or stet is entered pursuant to Rules 4-247 and 4-248."

> **entitled to be present.** *See Taylor v. State*, 352 Md. 338, 345, 722 A.2d 65, 68 (1998); *Stewart v. State*, 334 Md. 213, 224-25, 638 A.2d 754, 759 (1994); *Bunch*, 281 Md. at 685, 381 A.2d at 1144. Indeed, the Supreme Court of the United States, too, has recognized that it is important, "especially in a criminal case," for the defendant "to be present from the time the jury is impaneled until its discharge after rendering the verdict." *Shields v. United States*, 273 U.S. 583, 589, 47 S.Ct. 478, 479, 71 L.Ed. 787, 790 (1927). Therefore, and in that regard, the Supreme Court has cautioned against a court receiving "a communication from the jury and answer[ing] it, without giving the defendant and his counsel an opportunity to be present in court to take such action as they might be advised. . . ." *Id*., 273 U.S. at 587, 47 S.Ct. at 479, 71 L.Ed. at 789.
>
> **Rule 4-326(d) codifies these principles by providing that a court is "obliged to notify the defendant and the State's Attorney of the receipt of [any juror or jury] communication before responding" to it. *Stewart,* 334 Md. at 222, 638 A.2d at 758. "These prescriptions are mandatory, not directory. . . ."** *Id.*

428 Md. at 712-14 (footnotes omitted; emphasis added); *accord Grade*, 431 Md. at 95-96.

Rule 4-326(d) mandates that, whenever a "court official or employee . . . receives any written *or oral* communication from the jury or a juror[,]" the trial judge must be notified, and if the communication "pertains to the action," the judge must, *before* responding to the communication, "direct that the parties be notified of the communication and invite and consider, on the record, the parties' position on any response." Md. Rule 4-326(d)(2)(B)-(C) (emphasis added).

Appellants contend:

> It is clear from this record that the trial court failed to comply with the mandates of Rule 4-326(d) by failing to notify the parties of the jury's communication [inquiring about the manila folder] before responding thereto, failing to respond to the jury's communication in writing or orally in open court[,] and by further failing to fully notify the parties of the communication until two days after the jury rendered its verdict. This error denied [each appellant] of his right to be present at every stage of his trial, as

> guaranteed by the Declaration of Rights, the United States Constitution and Rule 4-231. Because this error was not harmless, a new trial is warranted.

Our review of cases addressing violations of Rule 4-326(d) persuades us that there was violation of that rule and the State did not meet its burden of establishing that it was harmless beyond a reasonable doubt.

In *Denicolis*, the Court of Appeals observed that Rule 4-326(d) mandates (as did its predecessors) that a trial court

> "notify the defendant[s] and the State's Attorney of the receipt of any communication from the jury pertaining to the action before responding to the communication." The Rule also requires that "[a]ll such communications between the court and the jury shall be on the record in open court or shall be in writing and filed in the action." **Both mandates, but particularly the first, implement, in part, the Constitutional and common law right of a criminal defendant to be present at every critical stage of trial**.

378 Md. at 656 (emphasis added; citation omitted).

In *Denicolis*, the Court of Appeals noted that this right of an accused in a criminal prosecution to be present at every stage of the trial includes '"any communication whatsoever between the court and the jury[,] *unless* the record affirmatively shows that such communications were not prejudicial or had no tendency to influence the verdict of the jury."' *Id*. (quoting *Midgett*, 216 Md. at 36). The Court further reiterated in *Denicolis*, that the right to be present "is absolute and that '**a judgment of conviction ordinarily cannot be upheld if the record discloses a violation of the right**.'" *Id.* (quoting *Stewart*, 334 Md. at 225) (emphasis added). The only exception was said to be for communications "that clearly do not pertain to the action or to a juror's qualification to continue serving and that are of a purely personal nature." *Id.* at 657.

The communication that led to reversal of the conviction in *Denicolis* was a written note from the jury (asking for a definition of solicitation) that was apparently not disclosed to the parties during trial; the note was discovered in the record by counsel while preparing for the appeal. Although this Court had held that the claim of error had not been adequately preserved, *id*. at 656, the Court of Appeals held otherwise, stating:

> It is clear that a communication from the jury was received, for it appears in the record and is labeled as a court exhibit. It is also clear that neither petitioner nor his attorney were informed about the communication. That alone constitutes error. The question is whether, under the circumstances, the error is harmless—harmless beyond any reasonable doubt.

Id. at 658.

The Court concluded that the judgments "must be reversed[,]" explaining:

> **Once error is established, the burden is on the State to show that it was harmless beyond a reasonable doubt.** The record must affirmatively show that the communication (or response or lack of response) was not prejudicial. . . . [E]ven an ambiguous record cannot support a harmless error argument, and if an ambiguous record is insufficient, so, surely, is a silent record. The judgments must be reversed.

Id. at 658-59 (internal citations omitted; emphasis added); *accord Perez*, 420 Md. at 66.

One of the cases the *Denicolis* Court quoted was *Stewart*, 334 Md. 213, another case in which the Court of Appeals held that the trial court's failure to notify counsel of a communication with a juror was a breach of Rule 4-326 that required a new trial. The record in *Stewart* reflected that, during jury deliberations, one juror had asked to talk with the trial judge. The judge reluctantly went to the jury room and asked the juror step out to speak. The juror was upset and tearful and said she was '"afraid she was going to say

something she shouldn't say to one of the other jurors."' 334 Md. at 217. Without consulting the attorneys in the case, the judge told the juror '"to use your conscience about how you handle disagreements[,]"' and then '"asked her to go back and continue deliberating and exercise her best judgment as to how her duty should be discharged."' *Id.* at 217-18.

Although the trial judge had not solicited input from counsel before speaking with the distraught juror, one of the defense attorneys had been in the courtroom and overheard someone yelling and crying. *Id.* at 218. As soon as the judge finished conversing with the juror, defense counsel approached the judge and asked '"to go on the record for a mistrial[.]"' *Id*. The judge declined to take further action at that point, but, when the jury subsequently sent a note asking about the ramifications of a "hung jury," the judge called all the parties to the courtroom, and told all counsel and the defendant about his earlier conversation with the upset juror. The attorney who had overheard the upset juror made a statement '"for the record"' that, '"as soon as [the judge] finished [speaking to the juror,] I did approach you[,]"' and she added, '"I would at this time ask for a mistrial based on manifest necessity."' *Id.* at 218-19. The judge replied at that time that he would take the motion under advisement, *id.* at 219, and thereafter instructed the jury that '"[a] result of a hung jury is not a factor to be considered by you."' *Id*. at 219 n.2. The jury soon rendered verdicts finding the defendant guilty. The trial judge then denied the motion for mistrial.

Id. at 220. A motion for new trial was also denied. This Court affirmed the convictions in an unreported opinion, *see Stewart v. State*, 97 Md. App. 770 (1993).[10]

In *Stewart*, as mentioned above, the Court of Appeals noted preliminarily that, when the motion for mistrial was made, trial counsel did not cite either Maryland Rule 4-326 (regarding communications with the jury) or 4-231 (regarding a defendant's right, with some exceptions, to be present at every stage of trial), and appellate counsel had cited only Rule 4-326 in the Court of Special Appeals. Nevertheless, the Court of Appeals said that it would consider the violations of both rules despite the lack of preservation in the circuit court: "We exercise our discretion here to determine the propriety of the denial of the motion for a mistrial on the basis of Rules 4-326(c) and 4-231 even though those Rules were not relied on by—or argued before—the trial court." 334 Md. at 222 (citing Maryland Rule 8-131(a)).

Recognizing that it had pointed out in *Graham v. State*, 325 Md. 398, 415 (1992), that the rule requiring full disclosure of a communication from the jury applied only to communications "pertaining to the action," and that a violation of the rule "may not require reversal" for an issue that was not preserved for appeal or was harmless, *Stewart,* 334 Md.

[10] Although our opinion in Stewart's case was unreported, the Court of Appeals quoted our opinion as explaining that we were affirming the denial of the motion for mistrial because "we [were] not persuaded that the court's advice to the distraught juror to use her 'conscience' and 'best judgment' in coping with her fellow juror prejudiced the accused[.]" *Stewart,* 334 Md. at 221 (quotation marks and citation omitted). The Court of Appeals disagreed with that conclusion.

at 223, the *Stewart* Court concluded that those exceptions did not apply in Stewart's case, stating in part:

> The communication between [the juror] and the trial judge surely "pertained to the action;" it was during the course of a vital part of the trial. A juror's reluctance to continue to deliberate with the other jurors and separating from the other jurors by leaving the jury room cannot be divorced from the action. There is no question that the ex parte meeting between the judge and the juror was an erroneous procedure. But that did not stand alone. [The defendant] was not present during this discourse between the juror and the judge. He was in the lockup awaiting the return of the jury. He was not informed at that time of the communication from the juror and the judge's response thereto. The prosecutor was not timely notified, nor was defense counsel. The communication between the judge and the juror was not on the record in open court or in writing and filed in the action contemporaneously with its occurrence. It is clear that the failure of the trial judge to obey the commands of Rule 4-326(c) constituted error. Before us, the State conceded that there was at least a "technical violation" of the Rule.

Id. at 223-24.

With respect to Maryland Rule 4-231, the Court explained: "Any communication pertaining to the action between the jury and the trial judge during the course of the jury's deliberations is a stage of the trial entitling the defendant to be present." *Id*. at 224-25. Further, the Court stated: **"The right is deemed 'absolute,' and a judgment of conviction ordinarily cannot be upheld if the record discloses a violation of the right."** *Id*. at 225 (emphasis added).

Applying the "harmless error" standard adopted in *Dorsey v. State*, 276 Md. 638, 659 (1976), the *Stewart* Court concluded "that the record here demonstrates that [the defendant] was prejudiced by the judge's errors." 334 Md. at 228. The Court identified the prejudice as the lack of opportunity for input into the judge's response to the juror and

the deprivation of the defendant's right to be present during any communication from the judge to the jury. The Court explained:

> [The defendant]'s absence at the meeting between the judge and [the juror] precluded [the defendant] from having "input" in the judge's response to the juror's conduct. [The defendant] may have had other suggestions as to how the situation could be handled, for example that the trial be continued upon agreement with eleven jurors. **No matter how innocent the motives of the judge may have been, and no matter what may have actually been said to the juror (the conversation here was not recorded), the mere opportunity for improper influence in [the defendant]'s absence prejudiced him. [The defendant] was denied the chance to evaluate the distress of the juror and the judge's solution to the problem and make such objection and suggestions as he deemed to be advisable.** It may be that what the judge said to the juror was no more than a repetition of a part of his instructions to the entire panel before the jury retired. Even so, **[the defendant] was entitled to be present**. *See Midgett v. State*, 216 Md. at 36, 139 A.2d 209. It was clearly prejudicial for the judge to further instruct one juror rather than the entire panel. We are aware of no authority that authorizes a judge to instruct or give additional instructions to other than the entire panel duly assembled in the presence of the defendant and his counsel pursuant to the dictates of Rule 4-326(c) and Rule 4-231. *See* Rule 4-325 (Instructions to the Jury). Further, the substance of the judge's conversation with the juror, as described by the judge, prevents the error from being harmless.

Id. at 229 (emphasis added).

In *Perez*, 420 Md. 57, the appeal concerned the trial judge's failure to disclose six notes received from the jury. The State conceded that the trial judge violated the dictates of Maryland Rule 4-326(d) by failing to disclose the notes. This Court had held, in an opinion reported *sub nom. Canela v. State*, 193 Md. App. 259 (2010), that the failure to disclose the notes was harmless beyond a reasonable doubt. The Court of Appeals disagreed, and remanded for a new trial.

In *Perez*, each of the notes that the trial judge failed to disclose pursuant to Rule 4-326(d) was submitted during the evidentiary portion of the trial, and five of the six notes contained questions about witnesses' testimony. *See Canela*, 193 Md. App. at 274-86 (reviewing the substance and context of the jurors' notes); *cf. Perez*, 420 Md. at 71-73 (describing the five notes that asked questions regarding the trial testimony of witnesses while they were still on the stand). The record reflected that the trial judge, without consulting the parties, asked the witnesses the questions that had been submitted in the notes from jurors. In this Court's opinion in *Canela*, we pointed out that, with respect to those five notes, the appellants argued, in support of their claim of prejudice, "that 'knowing that jurors have particular concerns as reflected in those notes would have been important information for counsel[,]'" and also argued that those notes "'reflected precise and important substantive concerns the jury had with the evidence in the trial.'" 193 Md. App. at 283. Nevertheless, this Court asserted that it was "impossible for us to envision how defense counsel's trial strategy may have differed if they had known the source of the question[s] was a note from the jury[,]" and we therefore failed to see how the result could have been different if the trial court had timely and properly disclosed the notes in accordance Rule 4-326(d). *Id.* at 286.

After granting a writ of certiorari for review of this Court's *Canela* decision, the Court of Appeals agreed with the petitioners' argument in *Perez* that the trial judge's violation of Rule 4-326(d) was not harmless error, stating:

> [T]he Petitioners argue that the "errors in the present case were hardly harmless. Five of the six notes reflected precise and important substantive

> concerns the jury had with evidence in the trial. Counsel were entitled under the rule to know that the jury had asked these questions so that counsel could use this information about the jury's concerns to adjust their trial strategy or . . . [to undertake] follow-up questioning of the witness." We agree with the Petitioners that the trial judge's failure to disclose to counsel the origin of the five substantive questions, four of which the judge posed to the witnesses at trial, was not harmless beyond a reasonable doubt.

420 Md. at 69-70.

The Court of Appeals explained in *Perez* that this Court (in *Canela*) had incorrectly shifted the burden to the appellants to prove the harmlessness of the trial court's error in failing to comply with Rule 4-326(d):

> **We agree with Petitioners that "despite stating correct principles of law, the intermediate appellate court then shifted the burden to Petitioners to show precisely how they were prejudiced by the non-disclosure of the jury notes by delineating what defense counsel would have done differently had the notes been disclosed." The Court of Special Appeals** stated several times that it could not find prejudice, and **faulted the Petitioners for not affirmatively showing prejudice**. Despite appearing to apply the *Dorsey* harmless error standard, the court did not hold the State to its burden of proving the errors were harmless beyond a reasonable doubt. Simply stating that the court failed to see how the outcome would be different is not the same as the court determining that the error did not influence the verdict. **Moreover, it is not the province of an appellate court to speculate as to how the defense would have reacted to the disclosure of the note in order to ascertain prejudice**.
>
> We also agree with Petitioners that expanding the harmless error standard to allow a trial judge to read a jury note, not inform counsel, and ask the question directly to the witness without allowing for counsel's input in advance, would fundamentally alter the rule. As seen in the trial judge's testimony, at the evidentiary hearing, the trial judge believed there to be a category of jury notes, not outlined by the rule or prior cases, which would allow a judge to use his or her discretion in dealing with what the trial judge characterized as "obvious" or "clarifying" questions, rather than follow the dictates of the rule and require input from counsel prior to responding. . . . Instead of protecting an "absolute" and "fundamental" right which is "simple to adhere to in practice," such a change would greatly expand the discretion

> of the trial judge and allow him or her to determine when the defendant may exercise his or her right to be present for all communications between the court and the jury. To be sure, to create such an exception to the rule of disclosure would invite mischief and thereby undermine the public's trust and confidence in the jury system.

420 Md. at 75-76 (emphasis added).

The *Perez* Court found that the defendants were prejudiced because the trial court's failure to disclose the notes deprived counsel of an opportunity to provide input before the court took action in response to the notes. In other words, the focus of the Court's harmless error analysis was upon the procedural opportunity that was not afforded the defendant rather than the substance of the questions that were posed by the trial judge. The Court explained:

> Applying *Dorsey* and its progeny, we must determine, based on the record, whether the error possibly influenced the verdict in this case. **Petitioners are not required to prove what they would have done differently; the burden is on the State to persuade us beyond a reasonable doubt that violations of Rule 4-326 did not influence the verdict to the Petitioners' prejudice.** In this case, although most of the notes in question were asked to the witnesses by the judge, this did not relieve the court of its obligation to inform both parties that the communications originated with the jurors and the substance thereof, pertaining to noncollateral issues, prior to any response by the court. **The trial judge's failure to disclose the receipt of the jury notes to counsel deprived counsel of the opportunity to have input into the form and substance of the court's response.** We are not persuaded beyond a reasonable doubt that the failure of the trial judge to inform counsel of the receipt and content of the jury notes . . . prior to the court's response to the jury's inquiry, did not influence the jury's verdict. Consequently, we shall reverse the judgment of the Court of Special Appeals and direct the intermediate appellate court to reverse the judgment of the Circuit Court, and remand the case to that court for further proceedings.

Id. at 76-77 (footnote omitted; emphasis added).[11]

In *Harris*, 428 Md. 700, the Court of Appeals affirmed this Court's holding (in *Harris v. State*, 189 Md. App. 230, 255 (2009)) that the circuit court had committed reversible error when it failed to disclose "a communication between a juror and the judge's secretary" regarding the fact that the juror's grandmother had passed away. 428 Md. at 704-06. The juror had alerted the court and counsel, just after being selected for the jury, that the juror's grandmother was not expected to live long, and the juror would want to go

[11] The *Perez* Court's focus upon procedural deficiencies rather than the substance of the trial court's response to each note was illustrated by one of the cases it cited in which the trial court's substantive responses to the jury's questions were correct although the court neglected to adhere to the procedural mandates of Rule 4-326. *Perez*, 420 Md. at 74-75 (citing *Taylor v. State*, 352 Md. 338, 354 (1998), and stating: "In *Taylor*, we stated that although the trial judge's responses were substantively correct, 'neither the petitioner nor his counsel had any input, or even any opportunity to have input, in the answers the jury received[.]'" 420 Md. at 75). In *Taylor*, the Court of Appeals held the violation of Rule 4-326 was not harmless, explaining:

> While the answers [the trial court] gave [to the jury in response to its notes] were substantively correct, the record does not reflect, as indeed it could not, all of the circumstances necessary to be considered in determining whether the petitioner was prejudiced by his, and in this case, his counsel's absence. What the record does show, and graphically so, is that neither the petitioner nor his counsel had any input, or even any opportunity to have input, in the answers the jury received. . . . The petitioner might well have asked the court to make the response clearer, or objected to the form of the response. . . . To be sure, when the supplemental jury instructions are substantively accurate, the petitioner may not be able, as in *Stewart*, to show prejudice affirmatively from the fact of the violation of the right to be present; however, neither does that fact mean that the record clearly shows a lack of prejudice resulting from that violation. On the contrary, at best, that circumstance renders the record silent on the issue so that prejudice will be presumed.

352 Md. at 354-55.

to her funeral if she passed away during the trial. The trial judge told the juror that the judge's chambers would provide a contact number for family to call if the need arose, and told the juror that staff would let him know if they received a call. *Id.* at 705.

Just after closing arguments, and before the jury began its deliberations, the judge's secretary received a telephone call reporting that the juror's grandmother had died. "Without notifying counsel of that communication, . . . the secretary spoke to the juror and, after informing the juror of his grandmother's death, inquired whether he was alright to continue. The juror answered that he was, assuming that he would soon be finished with deliberations." *Id.* at 705-06. (The Court of Appeals inferred, based upon the judge's subsequent comments, that the secretary shared the communication with the trial judge. *Id*. at 706 n.4.) Shortly after deliberations began, however, the juror sent a note asking to be excused from service. At that point, the trial judge shared with counsel and the defendant the juror's note as well as the substance of the communication with the judge's secretary that had taken place before the jury began its deliberations. *Id*. at 706. Defense counsel expressed dismay that they did not learn of the communication regarding the grandmother's death before the alternate jurors were dismissed and the jury began deliberations. *Id*. at 706-07. Defense counsel moved for a mistrial; the prosecutor opposed a mistrial and asked that the juror not be excused; the trial judge denied the juror's request to be excused and also denied the motion for mistrial. After the jury convicted Harris of second-degree depraved heart murder, he moved for a new trial based upon the untimely-disclosed communication between the judge's secretary and the juror whose grandmother

died. That motion was also denied. *Id*. at 709-10. This Court reversed the judgment and remanded for a new trial, and the Court of Appeals affirmed that result.

The State's primary argument in the Court of Appeals was that "the communication at issue, between the judge's secretary and the juror, did not 'pertain[ ] to the action[,]'" but, rather, was "'merely an administrative communication[.]'" *Id*. at 711. The Court of Appeals rejected that argument and reiterated that Rule 4-326(d) is intended to preserve a defendant's right to be present at every stage of the trial, with few exceptions. *Id*. at 712-14, quoted above.

With respect to the communication between the judge's secretary and the juror in *Harris*, the Court of Appeals stated:

> It is clear that the communication in this case, between the judge's secretary and the juror, falls squarely within the ambit of Rule 4-326(d). Here, the judge's secretary communicated with the juror for the purpose of informing him of the phone call she had received from the juror's father, in which he related that the juror's grandmother had died. That was not the end of the communication, however. [The secretary] went on to ask the juror if he was alright to continue. The subject of the communication—the health status of the juror's close relative, his grandmother, as well as the actual discussions—the disclosure of the fact that she had died and the juror's acknowledgment that he was alright to continue, issues discussed by the secretary and the juror, implicate and concern the juror's ability to continue deliberating. **Clearly,** therefore, at the very least, the latter part of the communication—**the inquiry as to whether the juror could continue—"pertain[ed] to the action."**
>
> * * *
>
> [I]t is important to remember that "the spirit of the Rule is to provide relevant information to those most vitally concerned with the trial . . . ." *Id.* Information that implicates, and may impact, a juror's ability to continue deliberation is relevant information that must be disclosed in compliance with Rule 4–326(d). That is especially so, where, as here, the juror suggests

> that his or her ability to continue is dependent upon a speedy conclusion of the trial.

428 Md. at 715-16 (footnotes omitted; emphasis added); *accord Grade*, 431 Md. at 100-01.

The Court also pointed out in *Harris*—as it had in previous cases—that one purpose of Rule 4-326(d) "'is to provide an opportunity for input in designing an appropriate response to each question in order to assure fairness and avoid error.'" 428 Md. at 720 (quoting *Harris*, 189 Md. App. at 247). Because counsel were not given an opportunity to provide input before the court communicated with the juror, "the court's failure to disclose the subject communication to counsel was error." *Id.*

With respect to the State's contention that any error in failing to timely tell counsel and the defendant of the secretary's communication was harmless, the Court of Appeals reiterated that the State has the burden of establishing the lack of prejudice: **"[I]t is error for a trial court to engage in a communication with the jury, or jurors, off the record, and without notification to counsel, and that error is presumably prejudicial unless the State can affirmatively prove otherwise."** *Id.* at 721 (emphasis added); *accord Grade*, 431 Md. at 105. Relying upon its analysis of the harmless error argument in *Stewart*, 334 Md. at 229, the *Harris* Court held that the State failed to carry its burden of establishing the lack of prejudice. 428 Md. at 721-22.

In *Grade*, the Court of Appeals quoted extensively from its opinion in *Harris*, and similarly concluded that the trial court's failure to comply with Rule 4-326(d) warranted a new trial. The trial court in Grade's case had, pursuant to Maryland Rule 4-312(b)(3),

substituted an alternate for a juror after the juror called to explain she would be arriving an hour later than the jury had been instructed to report. Instead of waiting to review the situation with counsel and the defendant, the court proceeded with the substitution and instructed to the jury to commence deliberations. When counsel later arrived, and the judge told them what he had done, defense counsel objected, but the judge responded: "What's done is done." 431 Md. at 89. **In rejecting the State's argument that there was no prejudice, the Court of Appeals said that that approach "disregards the role or significance of the notification and opportunity for input into that decision that Rule 4-326(d) provides and requires.**" *Id*. at 106 (emphasis added). The Court reiterated: "[**T]he right to notice and the opportunity to provide input have significance**." *Id.* (emphasis added).

The Court of Appeals stated: "The notification of counsel and their opportunity to have input are missing from the case at bar. We do not agree that the petitioner was not prejudiced by the Rule violation." *Id*. at 105. And, quoting the analysis it had set forth in *Harris* of "the principles that guide our prejudice inquiry[,]" the Court said again:

> "[I]t is error for a trial court to engage in a communication with the jury, or jurors, off the record, and without notification to counsel, and **that error is presumably prejudicial** unless the State can affirmatively prove otherwise."

Id. at 105-06 (quoting *Harris*, 428 Md. at 721) (emphasis added).

Noting, as it had in *Harris*, that "**the failure of notice necessarily deprives the defense of the opportunity to provide the input on how to proceed that the Rule contemplates**[,]" the Court held in *Grade* that "the State did not carry its burden to

establish that the petitioner was not prejudiced by the Rule violation." *Id*. at 106 (emphasis added).

In the most recent case in which the Court of Appeals has considered a violation of Rule 4-326(d), *Gupta*, 452 Md. 103, the Court concluded that, under the circumstances in that case, the State had met its burden of proving that the violation of Rule 4-326(d)(2)(C) was harmless beyond a reasonable doubt. The Court of Appeals acknowledged that, as Judge Douglas Nazarian had observed in this Court's reported opinion in the case: "'[N]o [previous] reported Maryland appellate case [had] held that the State met its burden of proving that a trial court's *ex parte* communication with a juror was harmless.'" *Id*. at 126 (quoting *Gupta v. State*, 227 Md. App. 718, 728 (2016)). But the Court of Appeals agreed with this Court's conclusion that Gupta's case "is materially distinguishable from those previous cases." *Id*. at 127.

In *Gupta*, the trial court had notified the potential jurors during *voir dire* that the case could take eight days or more to try. Prospective Juror 18A expressed personal concerns about her job and child care. The trial judge told counsel that he was inclined to excuse the prospective juror, but defense counsel objected, and Juror 18A remained in the pool and was selected for the jury. On the last day of the first week of trial, the court told the jurors that the trial was taking longer than expected, and they should let the court know on the coming Monday if they would have any conflicts with serving longer than the eight days previously predicted. On Monday, Juror 18A approached the judge's law clerk and expressed concern about plans for being out of town at a conference the following weekend

through the following Wednesday. When the law clerk told the judge of the communication, the judge—without soliciting input from counsel and the defendant—told the law clerk to tell the juror "that we'll deal with it on Friday. That we're not going to stand in the way of her going to her conference." *Id*. at 116.

Later in the day on Monday, the trial court told counsel and the defendant about the law clerk's communication with Juror 18A, as well as the court's response. The court indicated to the parties that Juror 18A could be replaced with an alternate if necessary, or deliberations could be suspended a few days until Juror 18A returned from her conference. The judge told the parties: "So the worst case scenario, rather than have a mistrial[,] we'll just skip a couple of days." *Id*. The judge concluded the conversation with counsel by stating: "I'm really giving you a heads up mainly to tell you about the communication that my clerk told her you know, this won't keep you from going to Las Vegas for your conference, okay." *Id*. at 117. Both defense counsel replied: "Thank you." *Id.*

It was the court's response to this mid-trial communication between the judge's law clerk and Juror 18A—without providing the parties an opportunity for input before the court responded to the juror—that was the basis of Gupta's appellate claim that the court had committed a violation of Rule 4-326(d)(2)(C) that was reversible error. *Id.* at 119. As it turned out, the court eventually decided to excuse Juror 18A rather than wait for her to return from her conference. Before that transpired, however, the court reviewed the issue with the parties on at least two additional occasions.

Two days after the judge's first disclosure of the exchange with the juror, the court was asked if he had given further thought to what he would do regarding Juror 18A if the trial had not concluded by Friday. *Id*. at 117. The court advised counsel that he thought it was likely the case would carry over the weekend, and, if that was so, Juror 18A would not be deliberating. *Id*. Defense counsel asked the court to postpone deliberations until after Juror 18A returned. But the court indicated it was not likely he would do so. On Thursday, Juror18A sent a note expressing concern about being unavailable the following Monday, Tuesday, and Wednesday. The court discussed that note with the parties. Defense counsel again proposed postponing deliberations until the juror returned from her conference. The court indicated that would be burdensome to the other jurors, and that it intended to replace Juror 18A with an alternate, but it would defer beginning deliberations until the following Monday morning, and would wait until then to officially replace Juror 18A. At the close of proceedings on Friday, the court gave Juror 18A permission to go to her conference and told her that she would be excused on Monday. And on Monday, the judge officially replaced Juror 18A with an alternate juror. *Id*. at 118.

On appeal, when the defendant asserted that the mid-trial communication with Juror 18A in violation of Rule 4-326(d)(2)(C) was reversible error, the State contended that the communication did not '"pertain to the action[,]"' but, even if the court did violate Rule 4-326(d)(2)(C), the violation was harmless beyond a reasonable doubt. *Id*. at 119-20. The State asserted that any violation of the Rule "was, 'by definition,' harmless because Juror 18A was dismissed and replaced with an alternate before deliberations began. Therefore,

the State assert[ed], 'it was impossible' for the alleged violation to have harmed Mr. Gupta." *Id*. at 124.

The Court of Appeals rejected the State's argument that the communication did not "pertain to the action." Consequently, "the circuit court was required to adhere to the procedures outlined in Rule 4-326(d)(2)(C)." *Id.* at 123. "This means the trial judge was required, **before responding to the communication**, to promptly notify the parties; to consider, on the record, the parties' position on any response; and to respond to the communication in writing or orally on the record." *Id*. (emphasis in original).

The Court also "reject[ed] the State's suggestion that a trial court can cure the presumed prejudice that arises from its *ex parte* communications with a juror by simply dismissing the 'infected' juror and replacing her with an alternate." *Id*. at 124.

Nevertheless, the Court concluded the trial court's infraction in Gupta's case was harmless beyond a reasonable doubt. *Id*. at 126-27. The Court pointed out that, unlike the situation in *Harris*, **"Mr. Gupta and his counsel were not denied an opportunity 'to provide input on how to proceed.'"** *Id*. at 127 (quoting *Harris*, 428 Md. at 722) (emphasis added). The Court of Appeals emphasized this point by highlighting the opportunities the court provided for input by Mr. Gupta and his counsel, explaining:

> Although the parties were not informed of Juror 18A's inquiry before the court responded to it, as required by Rule 4-326(d)(2)(C), **they were informed at a time when the court still had options before it regarding how to resolve the situation, and the parties had the opportunity to provide their input on those options**. In fact, defense counsel provided his input to the circuit court on three separate occasions after being informed of the communication, but before the court made its decision to dismiss the juror.

> Similarly, **in *Grade*, the defendant was prejudiced by the *ex parte* communication because it resulted in the judge dismissing a juror and replacing her with an alternate without receiving input from the parties**. *See Grade*, 431 Md. at 105, 64 A.3d 197 ("The notification of counsel and their opportunity to have input are missing from the case at bar."). Here, although the circuit court ultimately rejected defense counsel's proposals for how to resolve Juror 18A's scheduling conflict, its decision to dismiss the juror and replace her with an alternate was only made *after* considering and rejecting those proposals on the record. **We conclude that defense counsel's multiple opportunities to provide input on how to address the situation with Juror 18A, and the circuit court's acknowledgement on the record that it considered and rejected defense counsel's suggestions, are sufficient to distinguish this case from cases like *Grade* and *Harris*, where no such input occurred.** Furthermore, because both parties were provided an opportunity to offer input on how to resolve the situation before the court made its ultimate decision to dismiss Juror 18A, we cannot see how Mr. Gupta was prejudiced by the delay of one business day in being notified about the initial communication between the juror and the judge's law clerk.
>
> Therefore, we hold that the State has satisfied its burden of establishing that the trial judge's violation of Rule 4-326(d)(2)(C) was harmless beyond a reasonable doubt. **However, we reiterate that "[t]he rules governing communications between the judge and the jury are basic and relatively simple to adhere to in practice."** *Winder*, 362 Md. [275,] 322, 765 A.2d 97[, 123 (2001)]. **"These rules are not abstract guides. They are mandatory and must be strictly followed."** *Id*. Thus, "a court that communicates with jurors without first bringing the parties together in open court and obtaining their input skates on ice that can be dangerously thin." *Gupta*, 227 Md. App. at 737, 135 A.3d 926. **So while we hold that the subsequent opportunities for input were sufficient, on the facts of this case,** to show that Mr. Gupta was not prejudiced by the *ex parte* communication, we note that **the better practice for the circuit court would have been to inform the parties of the juror's inquiry before providing a response, as required by the Rule**.

Id. at 127-28 (bold emphasis added; italics in original).

In the cases presently before us, the trial judge failed to apprise the attorneys and defendants of a communication between court personnel and a juror on the second day of

jury deliberations, and, without providing the jury any guidance relative to its consideration of the documents in the manila folder that were not in evidence, the jury was instructed to recommence deliberations. It appears from the record that several hours passed before the jury reached a unanimous verdict, during which time the juror communication could have been described for the parties and counsel, and their input about the court's response solicited. During those hours, the court did, at one point, summon the attorneys and defendants to review and discuss a subsequently-received note from the jury, but did not mention the manila folder. Although the court later indicated that, while the jury was deliberating, it was investigating what had occurred with respect to the manila folder, the court did not mention anything to the parties about the juror communication regarding the folder until after the jury had announced its verdict, and had been polled and hearkened. As the Court of Appeals said in *Grade*, "[t]he notification of counsel and their opportunity to have input are missing from the case at bar." 431 Md. at 105.

The Court of Appeals stated plainly in *Perez* that the appellants "are not required to prove what they would have done differently[,]" 420 Md. at 76, and "it is not the province of an appellate court to speculate as to how the defense would have reacted to the disclosure of the note in order to ascertain prejudice." *Id*. at 75-76.

Appellants assert:

> The trial court's failure to comply with Rule 4-326(d) deprived [each appellant] of (1) his constitutional and common law right to be present at every stage of his trial, (2) the opportunity to provide input on the proper response to the jury's question [about the manila folder,] and (3) the opportunity to discover and pursue any remedy to the erroneous submission

> of the Clerk's Folder to the deliberating jury prior to the jury rendering its verdict.

Appellants further contend that they were prejudiced because the trial court's delay in disclosing the juror's communication precluded them from pursuing several possible alternatives:

> The trial court's failure to ***promptly*** abide its obligation under Rule 4-326(d)(2)(C) to notify counsel prevented [them] from proposing a course of action that would uncover the extent of the prejudice and enable the court to mitigate the impact of that prejudice. . . . If the trial court had strictly complied with Rule 4-326(d)(2)(C) by promptly notifying counsel that the jury had [possibly] *already* been considering the horrific photographs, counsel could have proposed a course of action other than a new trial. Strict compliance with Rule 4-326(d)(2)(C) before the jury reached its verdict would have enabled counsel to request (1) to examine each juror to determine whether he had viewed or been informed by other jurors about the horrific depictions of the decedent; (2) to examine each juror to determine the impact of the horrific depictions on his ability to reason dispassionately as an impartial juror; and (3) to offer a curative instruction commensurate with the degree of prejudice perceptible from the jurors' responses.

(Emphasis in original.)

We are mindful that it is the State's burden to persuade us that the error in no way prejudiced the appellants. And we agree with the appellants that it is certainly possible that, if the court had promptly told the parties in this case about the juror's inquiry regarding the manila folder, counsel could have pursued several options. Counsel might have suggested a more thorough investigation and examination of the jurors; and appellants' counsel could have argued a motion for mistrial while the jury was still deliberating. At a minimum, counsel could have requested that the court provide supplemental instructions to the jurors about their consideration of the documents that were not in evidence that were

mistakenly given to them on the first day of deliberations. All of those opportunities were foreclosed by the court's delay in reporting the communication.

Here, the appellants were not provided notice and opportunity for input regarding the juror's mention of the manila folder before the jury concluded its deliberations and announced its verdict. The State has not met its burden to persuade us beyond a reasonable doubt that the appellants were not prejudiced by the court's violation of Rule 4-326(d). *See Grade*, 431 Md. at 106. Under these circumstances, remand for a new trial is required as it was in *Grade*, and *Harris*, and *Perez*, and *Denicolis*, and *Stewart*.

JUDGMENTS VACATED. CASES REMANDED TO THE CIRCUIT COURT FOR BALTIMORE COUNTY FOR A NEW TRIAL. COSTS TO BE PAID BY BALTIMORE COUNTY.